United States Circuit Court of Appeals

For the Ninth Circuit

No. 10237

THE TEXAS COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

UPON PETITION TO REVIEW, AND REQUEST FOR ENFORCEMENT OF, ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

BRIEF FOR PETITIONER.

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Preliminary Statement.

This is the second time this case is before the Court. The opinion of this Court as a result of the first hearing was handed down on May 23, 1941, and is reported in 120 F. (2d) 186.

Jurisdiction.

The case is before the Court pursuant to Section 10 (f) of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Section 151, *et seq.*) upon petition by The Texas Company, petitioner herein, to review and set aside an order issued by the National Labor Relations Board under Section 10 (c) of the Act.

The jurisdiction of this Court is based upon Section 10 (f) of the Act which expressly provides for a review of orders and decisions of the National Labor Relations Board on the filing of a petition to set aside the Board's order by any aggrieved person who transacts business within the jurisdiction of the Circuit Court of Appeals in which the petition is filed.

As required by Section 10 (f) of the Act, The Texas Company, petitioner, is, and at all the times mentioned in said petition has been, transacting business in the States of Montana, Idaho and Arizona, and within the jurisdiction of this Court (R. 135).

Statement of the Case.

Proceedings Before the Board.

On September 3, 1938, upon charges filed by the National Maritime Union of America, Port Arthur Branch (hereinafter called "Union"), the respondent, the National Labor Relations Board (hereinafter sometimes referred to as the "Board") issued a complaint against your petitioner alleging that your petitioner had engaged in and was engaging in unfair labor practices affecting commerce in violation of Section 8 (1) and (3) and Section 2 (6) and (7) of the National Labor Relations Act (hereinafter sometimes referred to as the "Act") in that your petitioner had (1) discharged for union activities and refused to reinstate ten seamen employed on vessels of petitioner, (2) through its officers, agents and employees, made various statements to its employees discouraging affiliation in or activity on behalf of the Union, and (3) denied passes to representatives of the Union to board petitioner's vessels to contact members of the Union, all in violation of said Act (R. 4-9).

On or about September 12, 1938, your petitioner duly served and filed its answer and amended answer to said complaint in which your petitioner denied that it had engaged in or was engaging in any unfair labor practices or had violated the Act as alleged in said complaint (R. 10-13).

Thereafter, issue was joined and hearings held before a Trial Examiner. At the beginning of the hearings the Board's complaint was amended to include an allegation that petitioner had unlawfully discharged two additional seamen, making the total twelve (R. 85).

On May 8, 1939, the Trial Examiner filed his Intermediate Report in which he found that four seamen had been discharged by petitioner for union activities (R. 49, 50). Exceptions to the Trial Examiner's Report were duly filed with the Board by petitioner (R. 53-80). Subsequently, on October 24, 1939, oral argument was heard before the Board (R. 87).

On January 24, 1940, the Board rendered its decision and final order in which it found and concluded that petitioner had violated the Act in the respects hereinafter mentioned and in which it directed petitioner to cease and desist engaging in particular practices and to take certain affirmative action (R. 81-122). The Board specifically found, however, that petitioner had not violated the Act in refusing passes to board its vessels (R. 90-91).

On or about May 7, 1940, a petition for a review of the aforesaid order and decision was filed with this Court and on June 24, 1940, the Board filed an answer thereto requesting enforcement of its order.

Upon briefs filed by petitioner and the Board, and after oral argument in which petitioner and the Board participated by counsel, this Court, on May 23, 1941, entered its opinion (now officially reported in 120 F. (2d) 186), and a decree denying enforcement of the Board's aforesaid order

as to one Clarence Buckless, a seaman, and remanding the remaining portions of such order to the Board for reconsideration in the light of the Court's opinion and particularly certain maritime safety statutes to which the Court adverted in its opinion (R. 1725, 1740).

On June 28, 1941, and pursuant to this Court's opinion and decree above referred to, the Board vacated and set aside its decision and order of June 24, 1940, with the exception of paragraph 2(a) thereof, and, pursuant to notice served upon the petitioner and the Union, a hearing for the purpose of reargument was held before the Board in Washington, D. C. on July 17, 1941, at which hearing the petitioner and the Union were represented by counsel.

Thereafter, or on July 18, 1942, the Board handed down a decision and order in the case, signed by only two members of the Board, in which the Board, in effect, adhered to and reaffirmed its decision of January 24, 1940 (R. 1749-1781).

It is the decision and order of the Board of July 18, 1942, which petitioner is now asking this Court to review (R. 1783-1791).

The Board's Decision.

In its decision and order of July 18, 1942, the Board found that petitioner had violated the Act in the following specific respects:

1. That petitioner had interfered with, restrained, and coerced its employees on its vessel, the *S.S. California,* in the exercise of the rights guaranteed in Section 7 of the Act, by "warning its employees against Union organization, by threatening the discharge of Union members, and by questioning an employee concerning the identity of Union members" (R. 1759-1762).

2. That on two occasions petitioner had discharged for union activities and had refused to reinstate and award back pay to J. Gordon Rosen, a seaman (R. 1765-1776).

Upon the basis of these findings, the Board directed petitioner to

(1) cease and desist from

(a) discouraging membership in the National Maritime Union of America, Port Arthur Branch, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, or in any other manner discriminating in regard to their hire and tenure of employment, or any terms or conditions of their employment, because of membership or activity in any such labor organization (R. 1779);

(b) in any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act (R. 1779);

(2) take the following affirmative action:

(a) offer to J. Gordon Rosen immediate and full reinstatement to the position held by him on July 14, 1938, or to a substantially equivalent position (R. 1780);

(b) make whole J. Gordon Rosen for any loss of pay he may have suffered by reason of petitioner's discrimination in regard to his hire and tenure of employment (R. 1780);

(c) immediately post notices to its employees in conspicuous places on its docks and vessels, and maintain such notices for a period of at least sixty (60) consecutive days from the date of posting (R. 1780).

Specification of Errors.

Petitioner contends that the Board erred in the following respects:

1. In finding and concluding that your petitioner, by anti-union statements and in other ways, interfered with, restrained and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act, thereby engaging in unfair labor practices within the meaning of Section 8(1) and 8(3) of the Act.

2. In finding and concluding that your petitioner warned its employees against organization, threatened to discharge Union members, and questioned an employee about membership in the Union, and thereby interfered with, restrained and coerced its employees in the exercise of the rights guaranteed by Section 7 of the Act.

3. In finding and concluding that your petitioner discharged J. Gordon Rosen from the *S.S. Nevada* and the *S.S. Washington* because of union activities.

4. In directing petitioner to cease and desist and to take affirmative action as specified in the Board's decision and order and to post notices to such effect.

5. In that the Board failed to give due consideration to the opinion of this Court handed down on May 23, 1941, and to the maritime safety legislation discussed and adverted to in said opinion.

Summary of Argument.

Petitioner contends, in brief, that

1. There is no substantial evidence in the record to support the Board's conclusion that J. Gordon Rosen was discharged for union activities, but, to the contrary, the evidence shows that he was lawfully discharged for good and sufficient cause.

2. There is no substantial evidence in the record to sustain the Board's conclusion that petitioner, by anti-union statements or otherwise, interfered with the rights guaranteed to its employees by Section 7 of the Act.

3. The Board improperly ordered petitioner to cease and desist from "in any other manner" interfering with, restraining, or coercing its employees in the exercise of rights guaranteed by Section 7 of the Act.

4. The Board improperly directed petitioner to post cease and desist notices in the manner required by the Board's order.

POINT I.

There is no substantial evidence in the record to support the Board's finding and conclusion that petitioner discharged J. Gordon Rosen because of union activities.

It was contended by the Union and found by the Trial Examiner that J. Gordon Rosen had been discharged by petitioner for union activities on three separate occasions, as follows:

S.S. California.....September 19, 1937
S.S. Nevada.....April 19, 1938
S.S. Washington.....July 14, 1938
(R. 19, 49).

In its original decision in this case, handed down on January 24, 1940, the Board agreed with its Trial Examiner only in part, however, and held that Rosen was not discharged for union activities from the *S.S. California* (R. 100), but was discharged for union activities from the *S.S. Nevada* and the *S.S. Washington* (R. 108, 110).

In the oral argument and briefs filed on the review of the Board's original decision by this Court, petitioner contended that there was no substantial evidence in the record to sustain the Board's finding and conclusion that Rosen was discharged for union activities from either the *S.S. Nevada* or the *S.S. Washington,* but that, on the contrary, the overwhelming evidence proved beyond any doubt that Rosen was discharged from such vessels for neglect of duty. In this Court's opinion in that case, handed down May 23, 1941, this Court, after holding that one seaman, Clarence Buckless, had not been discharged for union activities, remanded the case to the Board for further consideration as to Rosen. In its opinion, this Court, speaking through Denman, J., made the following observations relative to Rosen's discharge:

> " * * * It appears that after Buckless' discharge, Rosen, a labor leader, proceeded to agitate among the seamen against the captain for his (the captain's) entirely justifiable action. Nothing could be more disruptive of the necessary respect due the captain's proper decision in matters of ship discipline. The fact that Rosen was a labor leader heightened the wrong. During Rosen's active leadership there had been threats of an illegal sit-down strike of the crew because there was among them one member of the International Seaman's Union. There was a jurisdictional dispute between his C. I. O. union and the I. S. U. and Rosen used the structure of the vessel itself to display on her side a large C. I. O. banner as she came into port. A labor leader so actively

> engaged in jurisdictional and other agitation among the crew, in part highly improper and in part justified, well may have been absent from his station and inattentive to his duties, as testified by the ship's officers. Cf. Peninsular and Occidental S.S. Co. v. National Labor Relations Board, supra. It is of note that three other active labor leaders not shown to have engaged in conduct subversive to the ship's necessary discipline remain as members of the crew." *The Texas Company* v. *National Labor Relations Board,* 120 F. (2d) 186, 190.

Although this Court did not specifically hold that the Board's findings in respect to Rosen were erroneous, it, nevertheless, indicated very definitely that it felt that Rosen, like Buckless, had not been discharged for union activities. The Court further indicated that the Board had disregarded the substantial body of "Congressional safety legislation for the manning, navigation, and management of vessels created to protect the lives of the members of the crew" in considering the problem which confronted it.

In remanding the case, this Court said (at p. 190):

> "Since the entire proceeding was conducted with such an ignoring of the long established Congressional legislation for the protection of life at sea and with such a misconception of the powers of a ship's officers and managers necessary in such protection, we deem it for the best interests of the participating parties and for labor legislation generally to remand to the now reconstructed Board the proceedings leading to those portions of the Board's order, other than that concerning the discharge and back pay of Buckless, for a reconsideration—having in view this opinion. Ford Motor Company v. National Labor Relations Board, 305 U. S. 364, 373; National Labor Relations Board v. Cowell Portland Cement Co., 108 F. (2d) 198, 206 (CCA–9); National Labor Relations Board v. Sterling Electric Motors, Inc., 118 F. (2d) 893, 897 (CCA-9), decided March 14, 1941."

An examination of the Board's decision of July 18, 1942, following reargument of the case pursuant to this Court's order, discloses that in reconsidering the proceedings it has failed to give proper consideration and weight to the maritime safety legislation referred to by the Court and to the duties of the master and crew. In fact, the Board flatly takes issue with the conclusions of the Court, particularly when the Board says:

> "Nor do we believe that prevention under the Act of discrimination by maritime employers against seamen who have engaged in concerted activities is in any sense incompatible with the marine safety legislation to which the Court refers in its opinion. To say that 'the fact that Rosen was a labor leader heightened the wrong' of the activity in which he engaged is to justify the discharge of active union members for conduct which in others might be regarded as not improper. Similarly, to presume that a seaman who leads his fellows in union activity 'well may have been absent from his station and inattentive to his duties' is to make union activity *prima facie* evidence of carelessness or incompetence. Either would make possible the discharge of seamen who are active union members or officers almost without reference to the propriety or impropriety of their activities according to normal standards and without regard for the proscriptions contained in the Act" (R. 1774).

After making the above comments, the Board proceeds to discuss the various activities of Rosen aboard the *S.S. Nevada* and the *S.S. Washington,* and then concludes that such activities did not endanger discipline or interfere with work aboard ship. Says the Board:

> "In any event, the record shows that Rosen's union activities neither endangered discipline nor interfered with his work, and we find that the respondent

in discharging him was not moved by any such considerations. Rosen's union activities on board the *S.S. Nevada* and the *S.S. Washington* consisted of presiding over weekly union meetings held in the crew's quarters, acting as delegate to discuss grievances with the ship's officers, drafting letters urging the crews of the respondent's other ships to join the Union and criticizing the respondent for its alleged refusal to improve working conditions, and protesting to the respondent's general manager the refusal of the captain of the *S.S. Washington* to recognize the delegates of the Union. There is nothing in the record to indicate that these activities endangered the safety of the respondent's ships on which Rosen worked or of the cargoes they carried, or that his union activities were detrimental to discipline on board those ships, within the meaning of the legislation to which our attention has been directed. Hence there is no basis for concluding that any of these Congressional enactments were violated by Rosen and it does not appear that he was prosecuted for any criminal offense in that respect. There is, therefore, no basis for believing that Rosen's reinstatement with back pay involves any such threat to discipline or safety or any such conflict with marine safety legislation as to require us to deny this normally applicable remedy. Upon reconsideration, we find no reason to alter our conclusion that Rosen was discriminatorily discharged and that his reinstatement with back pay will effectuate the purposes of the Act'' (R. 1775).

It is significant that the Board's decision of July 18, 1942 was not handed down for a year after reargument of the case before it. It is also significant that nowhere in the Board's decision does it comment upon or attempt to justify Rosen's conduct, *over the objection of the Master and officers,* in using the side of the *S.S. Washington* to display a large C. I. O. banner as the vessel came into port. Yet, that fact was regarded by this Court as rather convincing evidence of a disregard of discipline aboard ship and of the

safety of the ship, its cargo, and crew (see 120 Fed. (2d) 186, at p. 190).

In the brief filed by counsel to the Board at the first hearing before this Court, such counsel urged that the display of the C. I. O. banner was evidence of Rosen's union activities and sufficient reason for finding that he had been discharged for such activities.

It is obvious that the Board has misapprehended this Court's opinion. It is quite true that the display of the banner was evidence of union activities in a broad sense, but it was also evidence of the fact that Rosen was deliberately flouting the orders of the master of the vessel and its officers, and, consequently, endangering the lives of the crew and the safety of the vessel and its cargo.

Furthermore, an examination of the record discloses that Rosen's conduct was not union activity on behalf of his own union. The sign (13 feet to 15 feet long and 4 feet high) was displayed as an act of sympathy with a strike of the crew of a local ferry (R. 290, 291); it was displayed from the side of the ship at the port of New Orleans (R. 291); it was hung from the side of the ship again two days later at Port Arthur, Texas (R. 293). The sign was deliberately called to the attention of several officers of the vessel, and, although one of such officers said it ought not to be displayed, it nevertheless remained (R. 291-292). It was even put up again later by Rosen and his fellow seaman, Buckless, after it had been taken down (R. 293).

Obviously, this conduct on the part of Rosen and Buckless, and particularly Rosen, cannot be considered within the scope of legitimate or proper union activities. It did not concern union organization or activity aboard the *S.S. Washington*. To any reasonable man it was nothing more or less than a deliberate attempt on the part of Rosen and Buckless to ignore the authority of the officers of the ship. It certainly was not conducive to ship discipline.

Review of the Evidence.

Inasmuch as the evidence pertaining to Rosen's discharges from the *S.S. Nevada* and the *S.S. Washington* was undoubtedly given careful consideration by this Court on the first hearing of this case, petitioner deems it unnecessary to review such evidence in detail at this time.

Briefly, such evidence disclosed the following:

As to the *S.S. Nevada:*

The only evidence found by the Board to support its conclusion that Rosen was discharged for union activities was (1) Rosen's *own* testimony that he was an active union leader; (2) testimony of seaman Leo Herman to the effect that Chief Mate Tranberg told him that he (Tranberg) had fired Rosen for union activities; and (3) testimony of seaman George Hart that he was standing nearby when Herman reported to Chief Mate Tranberg that the rest of the crew objected to Herman's membership in the International Seamen's Union.

Petitioner does not dispute that Rosen was active in union matters but desires to point out that other seamen on the *S.S. Nevada* were just as active. Rosen himself admitted that, in addition to himself and Clarence Buckless, two other seamen, Lee Holmes and Sidney Cole, were ship's delegates and also active union men (R. 228). Board's witness, Clarence Buckless, made the same admission and added the ship's steward, Jensen (R. 783-784). All of these men, Buckless testified, remained on the vessel after Rosen left (R. 785). Moreover, Rosen also admitted that, except for one man, the ship was "100 per cent unionized" (R. 242, 414).

It should be evident, therefore, that there was nothing unusual in Rosen's activities on behalf of the Union and

that there existed no reason why he should have been discharged for such activities and not the other seamen who were also active union members. Certainly, such evidence is insufficient to prove that Rosen was discharged on April 19, 1938, for union activities.

As for the testimony of Herman, it was testified that nine days *after* Rosen left the ship Herman asked Chief Mate Tranberg why Rosen was "fired" and was told that he was fired for union activities (R. 907-908). Tranberg not only denied this statement but asserted that Rosen was discharged for neglect of duty (R. 1156, 1160). His testimony was corroborated by Captain Swanson, Master of the vessel (R. 1243-1245, 1248, 1278).

In considering Herman's testimony it should be borne in mind that he admitted that he later filed charges of unlawful discharge against petitioner (R. 892-895). He consulted Rosen about his claim and Rosen took him to a lawyer (R. 888). When asked about his later interview with Rosen he said: "When I went to the Goodhue Hotel I just went to help Mr. Rosen about the statement that the Mate said in the *Nevada*" (R. 892). It is questionable, therefore, whether Herman's testimony should be given much weight.

As for the testimony of Hart, it was testified that he was merely standing nearby when Herman spoke to Mate Tranberg shortly after Herman came aboard the *S.S. Nevada* (R. 497). He did not testify that he heard either Herman or Tranberg say anything about Rosen (R. 497, 498).

On the other hand, the overwhelming evidence unquestionably shows that Rosen had for some time been lax and neglectful of his duties and that his services were no longer desired by his superiors because his work had been found to be unsatisfactory. In support of this is the following evidence:

(1) *Testimony of Carl Tranberg.*

Tranberg, Chief Mate of the *S.S. Nevada,* and Rosen's immediate superior, testified that Rosen always "intentionally wanted to lag behind in his work all along and also in neglecting his duty" (R. 1150). He found Rosen playing cards when he should have been standing watch in bad weather (R. 1151). On another occasion he found Rosen writing when he should have been on watch (R. 1152). Twice Rosen failed to take his standby watch at night (R. 1153, 1154). As to the seriousness of this offense Tranberg testified:

> "Q. In operating a ship like the 'Nevada', is it or is it not important that a man be at his stand by watch? A. Absolutely.
>
> "Q. Why? A. It is required by law to have that amount of men on duty for the safety of property and lives aboard the ship" (R. 1154).

He warned Rosen that if he didn't do better he would have "to get somebody else in your place" (R. 1152). On April 19, 1938, he told Rosen he would replace him because of neglect of duty (R. 1160).

(2) *Testimony of Captain Swanson.*

Captain Swanson, Master of the *S.S. Nevada,* testified that Rosen appeared to him to be "purely lazy" (R. 1245). Rosen showed less interest in his work than the rest of the crew (R. 1244). Mate Tranberg complained to him (Captain Swanson) about Rosen's work "many times" and about Rosen's failure to stand watch properly (R. 1245).

There can be no doubt from the foregoing that the two chief officers of the vessel, the Master and Chief Mate, were satisfied that Rosen had been neglecting his duties and was, therefore, not a desirable seaman. In view of their testi-

mony can it be reasonably contended that Rosen was dismissed for union activities?

Assuming that there may be some doubt as to this, Rosen's own testimony dispels it. He admitted it was possible he "loafed" (R. 441). He also admitted that Mate Tranberg told him the reason he was "fired" was because "your work is not satisfactory" (R. 263).

Moreover, as pointed out above, Rosen and Clarence Buckless (a Board witness) both admitted that other seamen were as active union men as they were and yet were not discharged (R. 158, 783-786). Certainly such uncontradicted facts do not show a purpose on the part of petitioner to discharge men for union activities.

In concluding that Rosen was discharged from the *S.S. Nevada* for union activities it should be borne in mind that subsequently, on or about June 1, 1938, Rosen was rehired by respondent, this time on its *S.S. Washington* (R. 200, 331). Is that evidence that Rosen had been discharged for union activities? Isn't it more likely that if petitioner had already gone to the trouble of getting rid of Rosen for union activities it would not have reemployed him?

Petitioner submits that the substantial evidence proves beyond any doubt that Rosen was not discharged from the *S.S. Nevada* for union activities but that, on the expiration of his Shipping Articles on April 19, 1938, he was dismissed for cause.

As to the *S.S. Washington*:

After leaving the *S.S. Nevada* on April 19, 1938, Rosen testified that he was unemployed until June 1, 1938, at which time he signed shipping articles on petitioner's vessel, the *S.S. Washington* (R. 331). He was employed on such vessel until July 14, 1938 (R. 367).

Again, the Union contends that Rosen was discharged for union activities. Petitioner takes the position, however, that Rosen was not dismissed for union activities but that, on the expiration of his Shipping Articles on July 14, 1938, he was not reemployed because he again continually neglected his duties.

The conclusion that Rosen was discharged for union activities from the *S.S. Washington* is supported *solely* by Rosen's own testimony that he was active in union matters aboard ship (R. 276-290).

Again, as in the case of the *S.S. Nevada,* if it is assumed that Rosen did engage in the activities above referred to, there is no evidence in the record to show that such activities brought about Rosen's leaving the *S.S. Washington* on July 14, 1938, and the refusal of Captain Bergman of that vessel to reemploy him. Moreover, in the case of the *S.S. Washington* no testimony was introduced to corroborate Rosen's claim that he was discharged for union activities.

To the contrary, the substantial evidence proves conclusively that Rosen's services were no longer desired because his work had been found to be unsatisfactory. The following evidence supports this conclusion:

(1) *Testimony of C. P. Johannesen.*

Johannesen, Chief Mate of the *S.S. Washington* and Rosen's immediate superior, testified that about three days after the *S.S. Washington* left Port Arthur Rosen began to slack up and lag in his work (R. 1541, 1542). He didn't do required painting (R. 1542). It took him four hours to do two hours' work (R. 1542). He often left his working position during the time he was on duty (R. 1543, 1544). He was warned about a dozen times (R. 1568). At the Captain's suggestion Rosen was given a chance on a second trip but he failed to improve (R. 1544).

(2) *Testimony of Captain Bergman.*

Captain Bergman testified that Chief Mate Johannesen complained to him about Rosen's neglect of work (R. 1394). He himself verified the complaints (R. 1394, 1416). He decided Rosen was not the kind of a seaman to be carried on his ship (R. 1393, 1394). After one trip he told the Mate to give Rosen another chance (R. 1414). Since Rosen did not improve he told the Mate not to reemploy him (R. 1415).

(3) *The Crew List.*

Captain Bergman testified that the vessel's crew list was an official and customary report on which entries were made at the time seamen are paid off showing what men quit and what men sign new articles (R. 1396, 1401). Such list is made up in every port and sent in to the main office (R. 1401, 1402). The crew list of July 16, 1938, showed the circumstances under which Rosen left. The entry on such list was:

"Paid Off Previous Trip (Left Ship)

Name	*Capacity*	*Date*	*Reason*
Gordon Rosen (Petitioner's Exhibit R-18)	A. B.	Jul. 14	Discharged for incompetency"

The entries above referred to were made by Captain Bergman himself (R. 1395, 1396).

Again, as in the case of the *S.S. Nevada,* the two Chief Officers of the vessel, namely, the Master and Chief Mate, were satisfied that Rosen had been neglecting his duties. *In view of the testimony of such chief officers and the substantiating entry in the ship's crew list, can it reasonably be contended that Rosen was discharged for union activities?*

It is significant to note that Rosen admits that Mate Johannesen told him the reason he was letting him go was

because "Your seamanship is unsatisfactory" (R. 299, 300) and that he (Rosen) dragged along "too slow" (R. 301). This is substantially the reason testified to by the Chief Mate himself (R. 1542, 1544).

As to the entry in the crew list, the Board said in its order of January 24, 1940:

> "In view of Rosen's long experience as a seaman we do not credit the notation on the crew list that he was incompetent" (R. 109).

Since Captain Bergman and his Chief Mate Johannesen obviously used the term "incompetent" in referring to the fact that they had found Rosen to be "slow" and that he neglected his work, rather than to his ability as a seaman, the entry in the crew list should not have been disregarded. Furthermore, the keeping of a crew list is a regular part of a Master's duties on every voyage, and it is even required by statute on foreign voyages that the crew list be filed with the Collector of Customs (46 U. S. C. A., 677). It is clearly an entry made in the regular course of business and is entitled to weight as such.

During the course of his testimony Rosen admitted that there were other seamen who were active union men, namely, Archie West, Alfred Wukasch and L. Simmons (R. 285, 294-296). Yet all these men remained on the vessel after Rosen left (Petitioner's Exhibit R-18; R. 1397, 1398). Again, petitioner asks, is this an indication of a purpose to discharge men for union activities?

In disregarding the testimony of Captain Bergman and Chief Mate Johannesen that Rosen neglected his work, petitioner believes the Board failed to take into consideration that when Rosen was on the *S.S. Nevada* Captain Swanson and Chief Mate Tranberg of that vessel also testified that Rosen's work was unsatisfactory. Is it probable that all four of these men were not telling the truth? *Isn't it sig-*

nificant that Rosen was found to be guilty of neglect of duty on two separate occasions by the commanding officers of two separate vessels?

Furthermore, it should be borne in mind that, at least insofar as the *S.S. Washington* is concerned, which is the last vessel on which Rosen was employed, the only evidence to support the claim that Rosen was discharged for union activities is his own uncorroborated testimony. On the other hand, there is the testimony of the Captain and Chief Mate of the *S.S. Washington,* and the crew list kept by Captain Bergman. In addition, such testimony is clearly given weight and credibility by the testimony of the Captain and Chief Mate of the *S.S. Nevada,* who also swore that Rosen had been neglectful of his duties while a seaman on their ship.

In *National Labor Relations Board* v. *Sands Manufacturing Company,* 306 U. S. 332, 341, 342, the evidence was strikingly similar to the evidence here. There the evidence supporting the Board's order consisted solely of the testimony of two men who were discharged for incompetency but who thought they were discharged because of a "grudge" and union activities. Their claim was based primarily on anti-union statements made by certain foremen. The Supreme Court held that the anti-union statements made by supervisory employees were not necessarily evidence of their employer's policy and that the evidence in support of the Board's order was not much more than a scintilla and, therefore, could not be sustained. The Supreme Court said, speaking through Justice Roberts:

> " * * * The Board supports the conclusion by reference to the testimony of two men. One, Norman, who was, with the union's consent, discharged after the agreement of June 15, 1935, for incompetency, testified he thought he was discharged as a

> result of a grudge. He said that in June, one McKiernan, a shipping clerk who was his superior, told him when he complained about his discharge: 'I will tell you; there is a lot more of this than you and I know of. . . .' 'I will get you back when we break this union up. . . .' There is the further testimony of a witness Rudd who says that the superintendent said to him in June, in effect, that it would be better to have the A. F. of L. union as they were more conservative and not so likely to strike. This was just after 'Mesa' had called two strikes in the plant. Neither of the men who were quoted held such a position that his statements are evidence of the company's policy even in June, two months before the discharge, and the inference of hostility to 'Mesa' drawn from their testimony does not, in any event, amount to a scintilla when considered in the light of respondent's long course of conduct in respect of union activities and in dealing freely and candidly with 'Mesa'."

In the case at bar there is nothing to support the charge that Rosen was discharged for union activities other than the testimony of the discharged seaman himself that he was an active union man. In the light of the Supreme Court's decision above referred to how can such evidence be considered substantial!

Aside from the fact that Rosen's case is based entirely on his own testimony, practically all of his testimony consisted of notes made by him of conversations he himself had with others and conversation between others which he overheard (R. 270-303; 378-399). Obviously, most of this testimony was hearsay. Although the Courts have held that the Board can admit improper, immaterial and hearsay testimony, such evidence can not be said to be substantial when it is the sole foundation for the findings and order of the Board. *National Labor Relations Board* v. *Washington*

Dehydrated Food Co., 118 Fed. (2d) 980, 985 (C. C. A.—9th); *National Labor Relations Board* v. *Union Pacific Stages,* 99 Fed. (2d) 153, 176 (C. C. A.—9th); *National Labor Relations Board* v. *Bell Oil & Gas Co.,* 98 Fed. (2d) 870 (C. C. A.—5th).

In addition to all this evidence of Rosen's laziness and neglect of duty, there is also, as pointed out above, the *undisputed* evidence of the sign incident which this Court has already characterized as "in part highly improper" and as corroboration of testimony given by the ship's officers that he (Rosen) was "absent from his station and inattentive to his duties." See 120 F. (2d) 186, 190.

It is significant to note that in the brief filed with this Court at the previous hearing in this case, Board's counsel asserted that Rosen and Buckless were the "outstanding Union leaders on the ships in which they sailed" and that no other seamen were of "comparable stature" in Union affairs (Board's Brief, p. 15). Yet, although the Board concluded in its order of January 24, 1940, that Captain Bergman had discharged Rosen from the *S.S. Washington* for union activities, the Board also found that Captain Bergman had *justifiably* discharged Buckless from the same vessel! It is indeed difficult to understand why petitioner's conduct was proper in the one case and reprehensible in the other.

The courts have considered cases of discharge for inefficiency and refusal to obey instructions and it has been held that "interference with the right of an employer to determine when an employee is inefficient should not be lightly indulged in when applying the Labor Relations Act." *National Labor Relations Board* v. *Thompson,* 97 F. (2d) 13, 17 (C. C. A. 6th).

If any consideration at all is to be given an employer's judgment as to whether a particular employee is unfit for

his job either because of neglect of duty, drunkenness or some other cause, then certainly, as indicated by this Court, special consideration should be given such judgment in the case of tank vessels carrying a dangerous cargo such as gasoline, as is the case here. It should be borne in mind that the Master is in complete charge of the vessel. He is responsible for the safety of its cargo and personnel. His authority over his seamen is shown by the fact that disobedience to his commands may subject the seamen to (1) loss of wages, 46 U. S. C. A. 701; (2) suspension of their certificates by the Bureau of Marine Inspection and Navigation, 46 U. S. C. A. 239; and (3) possible indictment for mutiny, 18 U. S. C. A. 483.

Moreover, a vessel manned by an incompetent crew has been held to be unseaworthy:

Lord v. *Goodall,* 15 Fed. Cas. No. 8506;
In re Meyer, 74 Fed. 881;
In re Pacific Mail S. S. Co., 130 Fed. 76;
The Rolph, 299 Fed. 52.

In *Lord* v. *Goodall, supra,* it was held that the master of a vessel must exercise due care in the selection of his crew. In *The Rolph, supra,* the vessel was held to be unseaworthy and the owners of the vessel liable for damages for an assault committed by a seaman who had been shown to be of a brutal and violent nature.

In the proceedings herein being considered, the Captains and Mates of petitioner's vessels had found Rosen to be neglectful of his duty and had found Buckless to be an habitual drunkard. Under the above authorities, can there be any doubt that the Masters of petitioner's vessels would have been derelict in their duty had they reemployed these men?

The federal statutes impose rigid rules and standards in respect to ship operation. The U. S. Supreme Court has recognized the connection between working conditions and safety at sea and has pointed out that the primary purpose of the statutory regulations is to promote safety at sea.

O'Hara v. *Luckenbach S. S. Co.,* 269 U. S. 364, 367;
McCrea v. *U. S.,* 294 U. S. 23, 27.

Although an employer cannot dismiss an employee because of union activities, the evidence of such fact should be clear and the employer should not be deprived of his right to discharge an employee for good and sufficient cause. *National Labor Relations Board* v. *Lane Cotton Mills Co.,* 111 F. (2d) 814 (C. C. A. 5th).

In the light of the foregoing and in view of the peculiar conditions existing at sea, the case of *Peninsular & Occidental S. S. Co.* v. *National Labor Relations Board,* 98 Fed. (2d) 411 (Cert. denied 305 U. S. 653), points out that great weight is to be given the Master's testimony and he should not be held bound to retain under his supervision seamen whom he considers unfit or unsatisfactory. In commenting on the duty of a Master of a ship the Circuit Court of Appeals for the Fifth Circuit said, in that case (p. 414):

> "The owners of vessels, their masters and other officers, are required to exercise the highest degree of care and skill for the preservation of the lives of passengers and crews and to safely transport the cargo. This duty is superior to all other considerations in the operation of ships. Implicit obedience to the lawful orders of the master is required on a vessel. Without that there would be no safety. * * * "

The views expressed in the decisions above mentioned were concurred in in the first opinion of this Court in this

case (120 F. (2d) 186). Since such decision, the same views were expressed by the Circuit Court of Appeals for the Sixth Circuit in the case of *National Labor Relations Board* v. *U. S. Truck Co., Inc.,* 124 F. (2d) 887 (C. C. A. 6), and by the United States Supreme Court in the case of *Southern Steamship Co.* v. *National Labor Relations Board,* 62 S. Ct. 886 (1942).

In the *Truck Co.* case the Circuit Court held that an employee of the U. S. Truck Co. was properly discharged for a violation of safety regulations promulgated under the Motor Carrier Act and not for union activities. Said the Court (at p. 889):

> "The respondent is engaged in an interstate trucking business and operates between Michigan and Ohio under the Motor Carrier Act, Title 49 U. S. C. § 301 et seq., 49 U. S. C. A. § 301 et seq., a federal statute of equal force with the National Labor Relations Act. Employers who operate in interstate transportation are compelled to obey the mandates of the Motor Carrier Act equally with the mandates of the National Labor Relations Act, *and the safety provisions of the former statute are of paramount importance.*" (Italics ours.)

In the *Southern Steamship Company* case, the Supreme Court held that seamen who engaged in a sitdown strike while their vessel was in port and who defied direct commands to perform their duties were not discharged for union activities. Said the Court, speaking through Byrnes, J. (at p. 889):

> "Ever since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land. The lives of passengers and crew as well as the safety of ship and cargo are entrusted to the master's care. Every one and every thing depend on him. He must

command and the crew must obey. Authority cannot be divided. These are actualities which the law has always recognized. On the one hand, it has imposed numerous prohibitions against conduct by seamen which destroys or impairs this authority. We shall consider in a moment the nature and scope of the criminal sanctions imposed in case of revolt and mutiny. But it is worth noting here that the form of the 'shipping articles' which the master and every member of the crew must sign prior to the voyage has been carefully prescribed by Congress, and that these articles contain this promise: 'And the said crew agree * * * to be obedient to the lawful commands of the said master * * * and of their superior officers in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats, or on shore * * *.'

"In any event, a sweeping requirement of obedience throughout the course of a voyage is certainly not without basis in reason. The strategy of discipline is not simple. *The maintenance of authority hinges upon a delicate complex of human factors, and Congress may very sensibly have concluded that a master whose orders are subject to the crew's veto in port cannot enforce them at sea.* * * *

"* * * It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task." (Italics ours.)

Assuming Rosen was an active union leader, it is difficult to see how the Board, in the light of the above opinion and

of the previous opinion of this Court, can justify Rosen's inattention to his duties at sea and hold that the officers of the *S.S. Nevada* and the *S.S. Washington* should not have discharged him, but permitted him to remain aboard their vessels despite their better judgment.

There is a further reason for denying Rosen reinstatement and back pay in this case, and that is that, even assuming he may have been discharged for union activities, there is no evidence that his discharge resulted in any interference with or discouragement of union activities aboard either the *S.S. Nevada* or the *S.S. Washington.*

In the case of *Stonewall Cotton Mills* v. *National Labor Relations Board,* 129 F. (2d) 629 (C. C. A. 5th), it was pointed out that before an employer can be found to have committed an unfair labor practice in the discharge of an employee for union activities, it must appear that the discharge has in fact discouraged union membership. Said the Court:

> "When it comes to the layoffs and discharges found to have been in violation of Section 8(3) of the Act, the case stands differently. The courts have pointed out so often that it need not be elaborated here that though the fact of union activity or office in the union is a fact to be considered by the Board in connection with other facts bearing upon the issue, the affirmative of which is on the Board as accuser to establish before itself as trier, Magnolia Petroleum Co. v. N. L. R. B., 5 Cir., 112 F. 2d 545; N. L. R. B. v. Riverside Mfg. Co., 5 Cir., 119 F. 2d 302, 307; N. L. R. B. v. Tex-O-Kan, 5 Cir., 122 F. 2d 433; N. L. R. B. v. Union Mfg. Co., 5 Cir., 124 F. 2d 332, the invoked section does not, of course, mean that membership or office in a union is a guarantee against discharge, layoff or demotion. An employee, though he belongs to or is an officer of a union, may, like any other em-

> ployee, be discharged for any reason or for no reason at all, unless it is for a reason prohibited by the Act. *It must be borne in mind that this charge is not sustained by evidence and a finding merely that persons were discharged because of their union activity.* To make out a case under it, it must appear that an employer has by discrimination in regard to hire, etc., encouraged or discouraged membership in any labor organization. This requires proof of both the purpose and effect of the action under review. N. L. R. B. v. Air Associates, 2 Cir., 121 F. 2d 586, at page 592." (Italics ours.)

In the case at bar, Rosen himself admitted that the *S.S. Nevada* was "one hundred percent unionized" except for one man and that the *S.S. Washington* was completely unionized except for two men (R. 242, 414).

As to both the *S.S. Nevada* and the *S.S. Washington,* Rosen also admitted that there were aboard said vessels a number of other seamen who were active Union men (R. 158, 285, 294-296). Yet, all these men remained on such vessels after Rosen left (R. 801; Petitioner's Exhibit R-18).

Under the circumstances, it is difficult to see how Rosen's discharge in any way discouraged or interfered with unionization aboard the vessel. To the contrary, all the evidence indicates that the Union was at all times quite active and in fact had complete control of the vessels.

Applying the foregoing principles to the case at hand, and considering that in every instance the Master's testimony was corroborated by others, petitioner submits that there can be no doubt that Rosen was lawfully dismissed for good and sufficient cause.

Petitioner also submits that the Board has failed to give proper consideration to maritime safety legislation and the responsibilities of officers and crew of a vessel at sea, as

directed in this Court's opinion of May 23, 1941, and that if the Board had, it could not have avoided the conclusion that Rosen's conduct interfered with discipline aboard ship and thereby seriously endangered the safety of the ship, its cargo and crew, to an extent amply justifying his discharge.

POINT II.

There is no justification for the conclusion that respondent, by anti-union statements and in other ways, interfered with, restrained, or coerced its employees in violation of Section 8(1) and 8(3) of the Act.

In the Board's decision of July 18, 1942, in this case appears the following conclusion of law:

> "By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the respondent has engaged in and is engaging in unfair labor practices, within the meaning of Section 8(1) of the Act." (R. 1779.)

On the basis of such conclusion, the Board ordered petitioner (1) to cease and desist from (a) in any manner discriminating in regard to hire and tenure of employment or any conditions of employment and (b) in any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act; and (2) to post notices of compliance with the Board's order (R. 1779, 1780).

This conclusion is based on the finding by the Board that certain anti-union statements were made by Earl Baldwin,

Second Mate of the *S.S. California,* to J. Gordon Rosen and to James Blasingame while they were employed as seamen on such vessel. These statements are:

1. Baldwin's statement to Rosen when he reported for duty:

> "Just a minute, there is one thing I want to tell you we don't allow on this ship, and that is getting drunk, missing watches, and we don't allow any agitation with the crew on this union business."

2. Baldwin's statement to Blasingame warning him against "drunkenness", "missing watches", and "union agitating".

3. Blasingame's statement that:

> "He (Baldwin) told me he belonged to some union out on the west coast, and he got gypped out of about $50, and he never did get nothing out of it, and he ain't never had any use for a union since".

4. Baldwin's statement to Blasingame that he (Baldwin) had to get rid of a man "because he was agitating union all the time."

5. Baldwin's statement to Blasingame, when a newly hired seaman wearing a union button came aboard:

> "There is a man who won't ride this ship long."

6. Baldwin's statement to Blasingame, after Baldwin asked him if a certain new seaman was a "rank and file":

> "Well, if he is he won't be on this ship very long."

It is evident from a mere reading of the above statements that they are nothing more or less than expressions

of the opinion of Mate Baldwin regarding unionism. It is difficult to see how it can be said that such statements could represent the views or policy of petitioner.

When the statements were made Baldwin was either Second Mate or Acting First Mate on the *S.S. California.* He was not in charge of the vessel since the Master was Captain Peterson, who alone had complete authority over the vessel and its personnel (R. 953). Baldwin was merely a foreman in charge of the deck crew (R. 953). He was, therefore, only a supervisory employee.

The courts have held that general expressions of opinion regarding unions are not sufficient to sustain a charge of interference with employee rights. *National Labor Relations Board* v. *Union Pacific Stages,* 99 F. (2d) 153, 178 (C. C. A. 9th). It has also been held that an expression of preference for a particular union is not an unfair labor practice. *National Labor Relations Board* v. *Falk Corporation,* 102 F. (2d) 383, 389; *Jefferson Electric Co.* v. *National Labor Relations Board,* 102 F. (2d) 949, 956 (C. C. A. 7th); *L. Grief & Bro. Inc.* v. *National Labor Relations Board,* 108 F. (2d) 551, 558 (C. C. A. 4th); *National Labor Relations Board* v. *Swank Products,* 108 F. (2d) 872, 875 (C. C. A. 3rd); *Cupples Co. Manufacturers* v. *National Labor Relations Board,* 106 F. (2d) 100, 114 (C. C. A. 8th).

Moreover, spontaneous activities and statements on the part of minor supervisors not shown to be acting for the management are not evidence of an unfair labor practice by the employer. *National Labor Relations Board* v. *Swank Products,* 108 F. (2d) 872, 875 (C. C. A. 3rd); *Ballston-Stillwater Knitting Co.* v. *National Labor Relations Board,* 98 F. (2d) 758, 761 (C. C. A. 2nd).

In *National Labor Relations Board* v. *Sands Mfg. Co.,* 306 U. S. 332, the Supreme Court, in giving consideration to

the effect of statements made by supervisory employees, said (at p. 342):

> "* * * Neither of the men who are quoted held such a position that his statements are evidence of the company's policy even in June, two months before the discharge, and the inference of hostility to 'Mesa' drawn from their testimony does not, in any event, amount to a scintilla when considered in the light of respondent's long course of conduct in respect of union activities and in dealing freely and candidly with 'Mesa'."

In *Kansas City Power & Light Co.* v. *National Labor Relations Board,* 111 F. (2d) 340 (C. C. A. 8th) the Court said (at p. 351):

> "* * * The supervisory character of these two men is too minor for such statements to be regarded as expressions of the management without some proof of knowledge or authorization thereof by the management. National Labor Relations Board v. Sands Mfg. Co., 306 U. S. 332, 341, 342, 59 S. Ct. 508, 83 L. Ed. 682."

No evidence was offered by the Board to show that Baldwin's statements and expressions were authorized by or known to officials of petitioner. They were not even shown to be authorized by or known to Baldwin's superior, Captain Peterson.

On the other hand, the record is replete with evidence showing that the policy of petitioner was not to discriminate in any way between employees because of membership or non-membership in any organization. In fact, petitioner's policy in respect to labor is clearly set forth in its "Working Conditions and Overtime Rules", which were conspicuously posted on petitioner's vessels, and stated that:

"The Texas Company
Marine Department
Working Conditions and Overtime Rules
Unlicensed Personnel

October 1, 1937

Notice to all Employees

(To be posted on bulletin boards of all vessels.) The Company announces the following general policy which will govern working conditions aboard its vessels.

General Rules

1. No employee will lose his job or be forced off a ship because of his membership or non-membership in any organization.

* * * * * * * ,,

(Petitioner's Exhibit R-12; R. 1106, 1147; 1473).

Furthermore, the Masters and Mates of petitioner's vessels testified that their instructions were not to discriminate between their men because of union affiliations or activities and that that was their policy (R. 965-966, 1146, 1402, 1431, 1475, 1552).

Certainly, the working rules and instructions to the Masters of the vessels are better evidence of petitioner's policy toward labor than spontaneous and unauthorized expressions of opinion made by a supervisory employee. *Midland Steel Products Co.* v. *National Labor Relations Board,* 113 F. (2d) 800, 802 (C. C. A. 6th Cir.).

Moreover, there is no evidence whatsoever that petitioner approved or was even aware of the statements alleged to have been made. On the contrary, Baldwin had been told by Captain Roney, petitioner's General Marine Manager, not to discriminate between employees because of union

activities or affiliations (R. 964, 965). As to this Mate Baldwin testified:

> "Q. Has Captain Roney or Mr. Riever at any time told you not to discriminate because of union activities or affiliations?
>
> A. Yes, sir, he has told that aboard the ship there, not to discriminate aboard towards any unions.
>
> Trial Examiner Meyers: Was that in writing?
>
> A. No, sir, it was not in writing.
>
> Trial Examiner Meyers: Who told you?
>
> A. Mr. Roney" (R. 965).

It is quite evident, therefore, that if any of Baldwin's utterances displayed anti-union feeling or bias such utterances did not reflect the policy or views of petitioner.

A case precisely in point is that of *E. I. Du Pont De Nemours & Co.* v. *National Labor Relations Board,* 116 F. (2d) 388, 400 (C. C. A. 4th) in which it was held that, where an employer had specifically instructed its officials and supervisory employees to refrain from showing partiality between unions, isolated utterances hostile to unions were not sufficient to support a finding of unfair labor practices. Said the Court on this point (at p. 400):

> "* * * Petitioner had specifically instructed its officials and supervisory employees to refrain from giving indications of any partiality and to avoid any expressions of opinion in reference to union matters. * * *"
>
> "This Court in Martel Mills Corp. v. National Labor Relations Board, 4 Cir., 1940, 114 F. 2d 624, 633, 634, recently dealt with an alleged violation of Section 8(1) through sundry statements of supervisory employees. We stated therein: 'In the absence of evidence of any policy of proscribed discrim-

> ination, an employer should not be held strictly accountable for every isolated utterance of a policy-making officer concerning union activities. * * * And, where the conduct and actions of the employer fail to indicate any violation of the Act, an assemblage of unrelated, unconnected expressions of opinion does not very deeply impress this Court.' ''

Accord:

> *National Labor Relations Board* v. *Mathieson Alkali Works, Inc.,* 114 F. (2d) 796, 799 (C. C. A. 4th).

Then, too, the policy of petitioner, as expressed orally to Mate Baldwin by his superior, was reduced to writing and conspicuously posted on petitioner's vessels. Although the written statement of petitioner's policy was dated October 1, 1937, it is amply evident that the policy itself had been formulated some time prior thereto. The written statement merely confirmed a policy that had already often been orally declared by petitioner to the officers of its vessels (R. 964-966, 1146, 1402, 1431, 1475, 1552).

Petitioner does not dispute that minor supervisory employees may, under some circumstances, make statements or commit acts for which their employers are responsible. However, the test of such responsibility is whether the "employer may fairly be said to have been responsible" for the statements or acts (*National Labor Relations Board* v. *Link-Belt Co.,* 61 S. Ct. 358, 366), and whether the statements "reflect the policy of the employer" (*International Ass'n of Machinists* v. *National Labor Relations Board,* 311 U. S. 72, 92).

In the case at hand the evidence very plainly shows that the authority of Mates Baldwin and Rosen on the *S.S. California* was limited since Captain Peterson was in com-

plete charge of the vessel and he alone had the power to hire and fire (R. 953). Furthermore, as pointed out above, the utterances of Baldwin and Rosen did not reflect the policy of petitioner but were contrary to such policy. As was said by the Circuit Court of Appeals, 6th Circuit, in the case of *National Labor Relations Board* v. *Sparks-Withington Co., et al.,* 119 Fed. (2d) 78, 82, isolated instances of "personal zealousness and individual bias against the Union" on the part of supervisory employees is not binding on the employer.

* * * * * * *

Entirely apart, however, from the question of petitioner's responsibility for the statements alleged to have been made by its officers on the *S.S. California,* Baldwin and Rosen, there is no basis whatsoever for a finding that petitioner engaged in unfair labor practices by virtue of such statements, for the reason that no evidence exists that such statements resulted in any interference, restraint or coercion in violation of rights guaranteed by the Act.

In so far as the *S.S. California* is concerned, the only specific charge of unfair labor practices made against petitioner was the original charge that petitioner had discharged J. Gordon Rosen and James Blasingame for union activities. Yet, the Board found and concluded, in its decision of January 24, 1940, that Rosen and Blasingame had not been discharged from the *S.S. California* for union activities! Assuming, therefore, that the statements attributed to Mates Baldwin and Rosen were made, it is difficult to see how such statements did in fact interfere with, restrain or coerce petitioner's employees aboard the *S.S. California* in the exercise of rights guaranteed them by the National Labor Relations Act. *National Labor Relations Board* v. *Mathieson Alkali Works, Inc.,* 114 F. (2d) 796 (C. C. A. 4th).

In *Press Co. Inc.* v. *National Labor Relations Board,* 118 F. (2d) 937, it was said by the Circuit Court of Appeals, District of Columbia (at p. 942):

> "Before oral statements of an employer may be held to be an unfair labor practice, *it must appear that they interfered with, restrained, or coerced employees in the rights guaranteed by the Act,* that is to say, the right to join labor organizations, to bargain collectively, and to engage in concerted activities * * *." (Italics ours.)

Accord:

> *National Labor Relations Board* v. *West Kentucky Coal Co.,* 116 F. (2d) 816, 822 (C. C. A. 6th).

* * * * * * *

In considering whether petitioner should be charged with a violation of the Act because of the statements alleged to have been made by certain of its supervisory employees, petitioner submits that the Board should bear in mind that, although the original complaint charged petitioner with engaging in unfair labor practices in respect to twelve seamen, all of these charges have since been dismissed except the charge pertaining to one seaman, namely, Rosen, which is now before the Court. Certainly, this almost complete vindication of petitioner's conduct is some proof that petitioner has neither adopted nor approved a policy of discrimination or anti-unionism.

Petitioner submits that the record wholly fails to show that the utterances of Mates Baldwin and Rosen, if made, were approved by or reflected the policy of petitioner or that such utterances actually resulted in the slightest interference, restraint or coercion in violation of the Act.

POINT III.

The Board improperly directed petitioner to cease and desist from "in any other manner" interfering with, restraining, or coercing its employees in the exercise of their rights under the Act.

Among other things, the Board, in its order of July 18, 1942, directed petitioner to cease and desist from:

> "(a) Discouraging membership in National Maritime Union of America, Port Arthur Branch, or any other labor organization of its employees, by discharging or refusing to reinstate any of its employees, or *in any other manner* discriminating in regard to their hire and tenure of employment, or any terms or conditions of their employment, because of membership or activity in any such labor organization;
>
> "(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed by Section 7 of the Act." (R. 1779, 1780.)

In view of the decision of the United States Supreme Court in the case of *National Labor Relations Board* v. *Express Publishing Company,* 61 S. Ct. 693, it is now well settled that blanket "cease and desist" provisions similar to the above are improper. As stated by the Supreme Court:

> "The mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt

> proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged * * *."

The only specific charges of violation of the Act in this case are (1) the alleged discriminatory discharge of J. Gordon Rosen, and (2) the alleged violation of Section 8(1) of the Act in the charge that anti-union statements were made by certain employees of petitioner.

As to the discharge of Rosen, it is clear that, even if the charges as to him were sustained, there is no justification for the broad, blanket cease and desist provision above quoted. At most, petitioner would have violated the Act in the discharge of one seaman. That, certainly, is no ground for an order enjoining petitioner from "in any other manner" violating the Act.

As for the second item, even if the alleged statements were made, there is no evidence that the statements resulted in any interference, restraint, or coercion on the part of petitioner. In the absence of a particularization of the acts of interference or restraint, the broad order is clearly unwarranted. In the words of the Supreme Court, the order must state with "reasonable specificity the acts which the respondent is to do or refrain from doing."

It should be entirely clear that the Board erred in the generality and breadth of its order and that paragraph "(b)", above quoted, of the Board's order should be stricken and paragraph "a" modified so as to eliminate the phrase "or in any other manner discriminating in regard to their hire and tenure of employment, or any terms or conditions of their employment."

> *American Smelting & Refining Co.* v. *National Labor Relations Board,* 126 F. (2d) 680 (C. C. A. 8th);

Wilson & Company v. *National Labor Relations Board,* 123 F. (2d) 411 (C. C. A. 8th);
National Labor Relations Board v. *Cities Service Oil Co.,* 122 F. (2d) 149 (C. C. A. 2nd);
National Labor Relations Board v. *Burry Biscuit Co.,* 123 F. (2d) 540 (C. C. A. 7th);
National Labor Relations Board v. *Stone,* 125 F. (2d) 752 (C. C. A. 7th).

POINT IV.

The Board improperly directed petitioner to post cease and desist notices in the manner specified by the Board's order.

Paragraph 2(c) of the Board's order of July 18, 1942, reads as follows:

> "Immediately post notices to its employees in conspicuous places on its docks and vessels, and maintain such notices for a period of at least sixty (60) consecutive days from the date of posting, stating * * * ." (R. 1780-1781.)

Although petitioner operates a fleet of twenty-eight ocean-going vessels, only three, namely, the *S.S. California,* the *S.S. Nevada,* and the *S.S. Washington* are in any way involved in the charges of unfair labor practices now before this Court (R. 91-114). Since each master is in sole executive control of his own vessel, with power to hire and fire, and since the Board itself found that each vessel was a separate unit (R. 1766, n. 16), petitioner submits that any cease and desist notices which this petitioner should be required to post should be confined to the particular vessels in respect to which the unfair labor practices were found to have ex-

isted. Certainly, the determination of the existence of unfair labor practices at one factory or plant of a manufacturer could not be said to justify the posting of cease and desist orders at every other factory or plant owned by such manufacturer. It is submitted that the cases are analogous.

Assuming, therefore, that this Court sustains any part of the Board's order on the merits, the Board's order in respect to the posting of cease and desist notices should be modified so as to require petitioner to post notices only on the particular vessels involved in any unfair labor practices found to have been engaged in.

CONCLUSION.

The Board's petition for enforcement should be denied, and the Board's decision and order of July 18, 1942, should be vacated and set aside.

Respectfully submitted,

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December 18, 1942.